

United States
Circuit Court of Appeals
For the Ninth Circuit. 13

GLEN FULKERSON,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of
the Western District of Washington, Northern Division.

FILED
SEP 4 - 1924
F. D. MONDICKEN

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Circuit Court of Appeals
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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL.

EDWARD H. CHAVELLE, Esq., 315 Lyon Building, Seattle, Washington,
Attorney for Plaintiff in Error.

Messrs. TUCKER, HYLAND & ELVIDGE, 307 Lowman Building, Seattle, Washington,
Attorney for Plaintiff in Error.

THOMAS P. REVELLE, Esq., 310 Federal Building, Seattle, Washington,
Attorney for Defendant in Error.

C. T. McKINNEY, Esq., 310 Federal Building, Seattle, Washington,
Attorney for Defendant in Error. [1*]

United States District Court, Western District of
Washington, Northern Division.

May, 1923, Term.

No. 7934.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GLEN FULKERSON, LUELLA NULPH, and
RUTH MILLER,

Defendants.

*Page-number appearing at foot of page of original certified Transcript of Record.

INFORMATION.

BE IT REMEMBERED, that Thos. P. Revelle, Attorney of the United States of America for the Western District of Washington, who for the said United States in this behalf prosecutes in his own person, comes here into the District Court of the said United States for the District aforesaid on this 20th day of September, in this same term, and for the said United States gives the Court here to understand and be informed that as appears from the affidavit of Walter M. Justi, made under oath, herein filed: [2]

COUNT I.

That on the tenth day of September, in the year of our Lord one thousand nine hundred and twenty-three, at the City of Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this Court, GLEN FULKERSON, LUELLE NULPH, and RUTH MILLER then and there being, did then and there knowingly, willfully, and unlawfully have and possess certain intoxicating liquor, to wit, twenty-seven (27) pints of a certain liquor known as distilled spirits, twenty-seven (27) quarts of a certain liquor known as beer, two (2) one-fifth gallons and fifteen (15) ounces of a certain liquor known as whiskey, and twenty-five (25) ounces of a certain liquor known as gin, then and there containing more than one-half of one per centum of alcohol by volume and then and there fit for use for beverage purposes,

a more particular description of the amount and kind whereof being to the said United States Attorney unknown, intended then and there by the said GLEN FULKERSON, LUELLA NULPH, and RUTH MILLER for use in violating the Act of Congress passed October 28, 1919, known as the National Prohibition Act, by selling, bartering, exchanging, giving away, and furnishing the said intoxicating liquor, which said possession of the said intoxicating liquor by the said GLEN FULKERSON, LUELLA NULPH and RUTH MILLER, as aforesaid, was then and there unlawful and prohibited by the Act of Congress known as the National Prohibition Act; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [3]

And the said United States Attorney for the said Western District of Washington further informs the Court:

COUNT II.

That on the tenth day of September, in the year of our Lord one thousand nine hundred and twenty-three, at the City of Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, GLEN FULKERSON, LUELLA NULPH, and RUTH MILLER then and there being, did then and there knowingly, willfully, and unlawfully sell certain intoxicating liquor, to wit, fifteen (15) ounces of a certain liquor known as whiskey, and one (1) ounce of a certain liquor known as gin, then and there containing more than one-half of one per centum

of alcohol by volume and then and there fit for use for beverage purposes, a more particular description of the amount and kind whereof being to the said United States Attorney unknown, and which said sale by the said GLEN FULKERSON, LUELLE NULPH, and RUTH MILLER, as aforesaid, was then and there unlawful and prohibited by the Act of Congress passed October 28, 1919, known as the National Prohibition Act, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. [4]

And the said United States Attorney for the said Western District of Washington further informs the Court:

COUNT III.

That on the tenth day of September, in the year of our Lord one thousand nine hundred and twenty-three, at the City of Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, and at a certain place situated at Apartment F, 515 Seneca Street, in the said City of Seattle, GLEN FULKERSON, LUELLE NULPH, and RUTH MILLER then and there being, did then and there and therein knowingly, willfully, and unlawfully conduct and maintain a common nuisance by then and there manufacturing, keeping, selling, and bartering intoxicating liquors, to wit, distilled spirits, beer, whiskey, gin, and other intoxicating liquors containing more than one-half of one per centum of alcohol by volume and fit for use for beverage pur-

poses, and which said maintaining of such nuisance by the said GLEN FULKERSON, LUELLA NULPH, and RUTH MILLER, as aforesaid, was then and there unlawful and prohibited by the Act of Congress passed October 28, 1919, known as the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

THOS. P. REVELLE,
United States Attorney.

J. W. HOAR,
Assistant United States Attorney.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 20, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [5]

In the United States District Court for the Western District of Washington, Northern Division.

No. 7934.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GLEN FULKERSON, LUELLA NULPH, et al.,
Defendants.

ARRAIGNMENT AND PLEA.

Now, on this 5th day of November, 1923, the above defendants Fulkerson and Nulph come into

open court for arraignment accompanied by the attorney F. C. Reagan and say that their true names are Glen Fulkerson and Luella Nulph. Whereupon each defendant here and now enter their pleas of not guilty.

Journal No. 11, page No. 374. [6]

In the United States District Court for the Western
District of Washington, Northern Division.

No. 7934.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GLEN FULKERSON, LUELLE NULPH, and
RUTH MILLER,

Defendants.

TRIAL.

Now, on this 26th day of February, 1924, this cause comes on for trial with defendants Fulkerson and Nulph present in open court. Wilmon Tucker is present as attorney for defendant Fulkerson, and John F. Dore present as attorney for defendant Nulph. C. T. McKinney is present as counsel for the Government. Defendant Ruth Miller is called and there is no response. Defendant Miller is called three times in the corridor of the court and there is no response. It is ordered that the bail of said defendant Ruth Miller be forfeited *nisi* and that a bench warrant issue for her arrest. Where-

upon all parties being present, a jury is empaneled and sworn as follows: Martin L. Jones, E. D. Briggs, Clement W. Bales, John Dolan, Eug Bukies, Fred Besselman, Heman Austin, William S. Burt, Louis D. Jordon, Charles H. Alden, Emil J. Peschau and J. A. Turner. Opening statement is made to the jury by counsel for the Government. Government witnesses are sworn and examined as follows: Walter M. Justi, Gordon B. O'Hara and C. W. Kline, Government exhibits numbered 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, and 13 are introduced as evidence. Defendants' Exhibit "A" is introduced as evidence. Government rests. Motion by defendant Luella Nulph was made to dismiss count II as to her. Said motion is denied and an exception is allowed. Defendant's witnesses are sworn and examined as follows: Glen Fulkerson, John Volsuano and Richard Burr. Defendant rests. Government Exhibit 14 is introduced as evidence. Defendant Nulph renews her motion for a directed verdict on Counts I, II and III. Said motion is denied with exception allowed. Defendant Fulkerson moves for a directed verdict as to him on counts I, II, and III. Said motion is denied and exception allowed. Said cause is now argued to the jury for both sides. During the course of the argument for defendant, the U. S. Attorney moved for a directed verdict of not guilty on all three counts as to defendant Nulph. Motion is granted and the clerk was ordered to enter a verdict of not guilty on all counts of the information as to defendant Luella Nulph and judgment is now so entered.

The jury is instructed by the Court and retires for deliberation. Jury came into court at 4:40 P. M. Defendant Fulkerson and attorneys for both sides are present. Jury is called and all are present. A verdict of guilty on all counts as to defendant Fulkerson is returned. Verdict reads as follows: We, the jury in the above-entitled cause, find the defendant, Glen Fulkerson, is guilty as charged in Count I of the information herein; and further find the defendant, Glen Fulkerson, is guilty as charged in Count II of the Information herein; and further find the defendant, Glen Fulkerson, is guilty as charged in Count III of the information herein. Charles H. Alden, Foreman. Verdict is ordered filed and sentence continued to March 3, 1924. Defendant is allowed to go on present bail.

Journal No. 11, page No. 72. [7]

In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.

No. 7934.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GLEN FULKERSON and LUELLE NULPH,

Defendants.

VERDICT.

We, the jury in the above-entitled cause, find

the defendant, Glen Fulkerson, is guilty as charged in Count I of the Information herein; and further find the defendant, Glen Fulkerson, is guilty as charged in Count II of the Information herein; and further find the defendant, Glen Fulkerson, is guilty as charged in Count III of the Information herein.

CHARLES H. ALDEN,
Foreman.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Feb. 26, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [8]

In the District Court of the United States for the
Western District of Washington, Northern Division.

No. 7934.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

GLEN FULKERSON, LUELLA NULPH and
RUTH MILLER,

Defendants.

MOTION FOR NEW TRIAL.

Comes now the defendant Glen Fulkerson, and moves the Court for an order granting him a new trial of the above-entitled cause on the ground and

for the following reasons materially affecting the substantial rights of this defendant, to wit:

1st. Irregularity in the proceedings of the Court, jury and adverse party and orders of the Court and abuse of discretion by which this defendant was prevented from having a fair trial.

2d. Insufficiency of the evidence to justify the verdict and that it is against the law.

3d. Errors in law occurring at the trial excepted to at the trial by this defendant.

This motion is based upon the files, records and pleadings herein and upon all of the rulings of the Court and proceedings had and taken in the above-entitled cause and upon the minutes of the Court therein, and defendant, in support of the aforesaid motion, will rely upon the following *inter alia* errors which it is alleged were committed during the trial of the aforesaid cause:

1st. The Court erred in not directing the jury to return a verdict of not guilty as against this defendant on Count I. [9]

2d. The Court erred in not directing the jury to return a verdict of not guilty as against this defendant on Count 2.

3d. The Court erred in not directing the jury to return a verdict of not guilty as against this defendant on Count 3.

4th. The Court erred in refusing to direct the jury to return a verdict of not guilty against this defendant upon all the counts of this information.

5th. The Court erred in stating to the jury that he did not believe the evidence of the defendant,

Fulkerson, and in expressing to the jury his opinion of what the fact *of* facts were on the ground that it was an infringement of the right of this defendant to have the jury pass upon the fact of his guilt and prevented him from having a fair and impartial trial as provided by the Constitution of the State of Washington and of the United States of America.

6th. The Court erred in its definition to the jury of a nuisance under the terms of the Volstead Act.

7th. The Court erred in instructing the jury with reference to the punishment for violations of the Volstead Act as constituting an error prejudicial to the right of the defendant to have a fair trial as guaranteed by the Constitution.

TUCKER, HYLAND & ELVIDGE,
Attorneys for Defendant, Glen Fulkerson.

Received a copy of the within motion for new trial, 29th Feb., 1924.

THOS. P. REVELLE,
Attorney for plaintiff.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Mar. 1, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [10]

In the United States District Court for the Western
District of Washington, Northern Division.

No. 7934.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GLEN FULKERSON,

Defendant.

DECISION (ON MOTION FOR NEW TRIAL).

(Filed March 26, 1924.)

The defendant was convicted of violation of the National Prohibition Act. He has moved for a new trial, alleging the statutory grounds and the further ground that the trial Judge expressed to the jury his opinion of what the facts were, and thereby infringed the defendant's right of trial by jury, and erred in defining a nuisance.

The Court in its instructions, after referring to the issue and law applicable and the testimony on behalf of the parties, said:

“ * * Now the defendant says that he was in the hall; that he did have his coat off, as the officers of the Government say he did; that he did come into the room with the bottle of whiskey in his hand; that he did deliver to one of these men the bottle and did receive \$5.00. Now that far the testimony harmonizes. Now he said that the woman gave it to him; he did not know what it was; told him to give it to the men, and he did it; then the

officers came in and they found the \$5.00 in his hand, just as the officers testified they did. Now he was asked whether the bottle was wrapped up; he said no. He said he did not know what was in the bottle. It is for you to determine the fact. Now if he was in the hall, and if this woman gave him the bottle and told him to deliver it to these men, and he did not know what was in the bottle and received the \$5.00 without knowing what was in the bottle, or what he was doing; if you believe that, then he is not guilty, because he didn't know what was in the bottle. If you believe that a man could be on the police force in Seattle for three years and have a flask like that passed to him, with that color of contents,—a man on the police force, and not knowing it was whiskey or prohibited spirits provided by the Volstead law and the Prohibition amendment, then you must conclude that way, because it is for you to determine what the fact is. Now I don't want you to conclude from any opinion you may think I have of the facts. I don't believe a word of it myself. I believe he knew what was in the bottle; but that must not control you; you must find the fact. While I have a right to tell you what I think about the facts, you must not be controlled by what I think about them; you must weigh [11] all of the testimony and all of the circumstances and determine what the truth is. If you have a reasonable doubt as to the fact, then you should return a verdict of not guilty. But if you are convinced beyond a reasonable doubt that he did know what was in the bottle, then it is your

duty to return a verdict of guilty on the first count, and of guilty on the second count, because the possession of that one bottle would be sufficient to violate the law, as charged in this information, of possession and sale.

Now as to the next count, the count of the common nuisance. This is what the law says: 'Any rooming house or building where intoxicating liquor is kept in violation of the National Prohibition Act is declared to be a common nuisance.' Now if he was in possession of this liquor in the kitchen, if you believe he was in possession of that, and believe it was kept there, then you must find it was in violation of the National Prohibition Act, because he had no right to keep it there; and then if you find that this annoyed such part of the public that came in contact with it, and was not authorized by law under the National Prohibition Act, such would be a nuisance, and if you believe that beyond a reasonable doubt, then it would be your duty to return a verdict of guilty upon Count 3. But if you have a reasonable doubt upon that, then you will return a verdict of not guilty.

Now in these instructions, Gentlemen of the jury, I have related and referred to the facts or testimony and the circumstances with a view of illustrating or demonstrating some proposition of law which has its application to the facts, and have expressed some personal opinion, but I do not want you to be controlled by it in any sense, but I want you to conclude upon the evidence itself, so that the law may be administered fairly, if the law has been violated

that it may be enforced, and the parties who violate it be punished. When courts cease to function properly then may God have mercy upon the people of the United States. Law is a rule of civil conduct prescribed by a superior power, and persons must regulate their conduct with relation to that law. It is a rule by which people shall live, and when they violate that rule, then they must be punished; that is the only way we can have government; and when courts and juries won't function it will only be a short step to a condition of anarchy.

If you believe that the defendant went on the stand and perjured himself with a view of escaping a penalty, you will so conclude. Pass upon this fairly. It is your duty as twelve fair-minded men to give the defendant a square deal; he is entitled to it; the Government is entitled to a square deal; give it a fair and square deal in this case, and if you have a reasonable doubt upon all the circumstances developed here, you will resolve it in favor of the defendant; if you are convinced beyond a reasonable doubt, then return a verdict of guilty in this case, as your conscience dictates, and the right and truth is." [12]

C. T. McKINNEY, Asst. U. S. Attorney, for United States.

Messrs. TUCKER, HYLAND & ELVIDGE, Attorneys for Deft.

NETERER, D. J.—In the federal courts a Judge has the right to express an opinion upon the evidence,—*Horning vs. Dist. of Columbia*, 254 U. S.

135; *Robinson vs. U. S.*, 290 Fed. 755; *Dillon vs. U. S.*, 279 Fed. 639; *Van Gunder vs. Iron Co.*, 52 Fed. 838, and no objection can be successfully urged if the Judge expresses his opinion as to the guilt or innocence of the accused providing the jury is given unequivocally to understand that it is not bound by the expressed opinion of the Judge, but that the jurors must conclude upon the facts themselves. No error is apparent in the record and the motion for new trial is denied.

NETERER,

U. S. District Judge.

Cases cited by the defendant:

Hicks vs. U. S., 150 U. S. 442 (450).

Reagan vs. U. S., 157 U. S. 301.

Lovejoy vs. U. S., 128 U. S. 171.

Starr vs. U. S., 153 U. S. 614 (624).

Smith vs. U. S., 161 U. S. 85.

Millen vs. U. S., 106 Fed. 892.

Foster vs. U. S., 188 Fed. 308.

Oppenheim vs. U. S., 241 Fed. 625.

Other cases pertinent to the issue:

Rudd vs. U. S., 173 Fed. 912.

Sparf & Hansen vs. U. S., 156 U. S. 51.

Rucker vs. Wheeler, 127 U. S. 85-95.

Graham vs. U. S., 231 U. S. 474-80.

Young vs. Corrigan, 210 Fed. 442.

Dillon vs. U. S., 279 Fed. 639-42.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Mar. 23, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [13]

In the United States District Court for the Western
District of Washington, Northern Division.

No. 7934.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GLEN FULKERSON,

Defendant.

SENTENCE.

Comes now on this 14th day of April, 1924, the said defendant, Glen Fulkerson, into open court for sentence and being informed by the Court of the charges herein against him and of his conviction of record herein, he is asked whether he has any legal cause to show why sentence should not be passed and judgment had against him and he nothing says save as he before hath said, wherefore, by reason of the law and the premises it is considered ordered and adjudged by the court that the defendant is guilty of violating the National Prohibition Act and that he be punished by being imprisoned in the King County Jail or in such other prison as may be hereafter provided for the confinement of persons convicted of offenses against the laws of the United States for the period of six months on Count II of the Information and a period of six months on Count III of the Information, terms to run concurrently and to pay a fine of \$500.00 *Dollars* on Count I of the Information. And

the defendant is hereby remanded into the custody of the United States Marshal to carry this sentence into execution.

Judgment and Decree Book No. 4, Page No. 99,
[14]

In the District Court of the United States for the
Western District of Washington, Northern,
Division.

No. —.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GLENN FULKERSON,

Defendant.

PETITION FOR WRIT OF ERROR.

Comes now the above-named defendant, Glenn Fulkerson, by his attorney and counsel, Edward H. Chavelle, and Tucker and Hyland, and respectfully shows that on the 26th day of February, 1924, a jury empanelled in the above-entitled court and cause, returned a verdict finding said Guy Fulkerson guilty of the indictment heretofore filed in the above-entitled court and cause, and thereafter within the time limited by law, under rules and order of this Court, defendant moved for a new trial, which motion was by the Court overruled, and exception allowed thereto, and likewise, within said time filed his motion for arrest of judgment, and which was by the Court overruled, and to which an

exception was allowed; and thereafter on the 14th day of April, 1924, this defendant was by order and judgment of the above-entitled Court in said cause sentenced.

And your petitioner feeling himself aggrieved by this verdict, and the judgment and sentence of the Court entered herein as aforesaid, and by the orders and rulings of said Court, and proceedings in said cause, herewith petitions this Court for an order allowing him to prosecute a writ of error from said judgment and sentence, to the Circuit Court of Appeals of the United States for the Ninth Circuit, under the laws of the United States, and in accordance with the procedure of said Court made and provided, to the end that said proceedings as herein recited, and as more fully set forth in the [15] assignments of error presented herein, may be reviewed and manifest error appearing upon the face of the record of said proceedings, and upon the trial of said cause, may be by said Circuit Court of Appeals corrected, and that for said purpose a writ of error and citation thereon should issue as by law and ruling of the Court provided, and wherefore, premises considered, your petitioner prays that a writ of error issue, to the end that said proceedings of the District Court of the United States for the Western District of Washington, may be reviewed and corrected, said errors in said record being herewith assigned, and presented herewith, and that pending the final determination of said writ of error by said Appellate Court, an order may be entered herein that all further proceedings be suspended and

stayed, and that pending such final determination, said defendant be admitted to bail.

TUCKER & HYLAND and
EDWARD H. CHAVELLE,
Attorneys for Defendant.

315 Lyon Building,
Seattle, Washington.

Due service of within petition for writ of error admitted and receipt of copy thereof acknowledged this — day of April, 1924.

U. S. Attorney.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Apr. 15, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [16]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 7934.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GLENN FULKERSON,

Defendant.

ORDER ALLOWING WRIT OF ERROR.

On this 15th day of April, 1924, came the defendant, Glenn Fulkerson, by his attorney, Edward H.

Chavelle, and Tucker & Hyland and files herein and presents to the Court his petition praying for the allowance of a writ of error and assignment of error, intended to be urged by him, praying also, that a transcript of the records and proceedings and papers upon which judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial District, and that such other and further proceedings may be had as may be proper in the premises;

On consideration whereof, the Court does allow the writ of error and upon the defendant giving bond according to law, in the sum of \$2,000.00, which shall operate as a supersedeas bond.

Dated at Seattle, Washington, this 15th day of April, 1924.

JEREMIAH NETERER,
Judge.

Received a copy of the within Order this 15th day of April, 1924.

THOS. P. REVELLE,
M.,
U. S. Attorney.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Apr. 15, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [17]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 7934.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GLENN FULKERSON,

Defendant.

ASSIGNMENTS OF ERROR.

Now comes the above-named defendant, Glenn Fulkerson, by Edward H. Chavelle and Tucker & Hyland, his counsel, and says that in the record and proceedings in the above-entitled case, there is manifest error, in this, to wit:

1. The Court erred in allowing testimony to go to the jury during the trial of the case, over the objection of defendant's counsel, which was excepted to, and exception allowed.

2. The Court erred in refusing to grant the motion of the defendant for a dismissal of the information in this cause, for the reason and upon the ground that sufficient evidence had not been produced to constitute a crime.

3. The Court erred in overruling the motion of the defendant for a directed verdict of acquittal, made at the close of the entire case, and before it was submitted to the jury.

4. The Court erred in denying the motion of the

defendant for a new trial, which motion was made in due time after the jury had returned a verdict of guilty as charged in the indictment.

5. The Court erred in denying the motion of the defendant in arrest of judgment, which motion was made in due time after the jury had returned a verdict of guilty as charged in the information.

6. That the Court erred in its instructions to the jury, which said instructions were duly excepted to at the time of [18] trial, and said exception allowed.

WHEREFORE, the said Glenn Fulkerson, defendant above-named, prays that the judgment be reversed, and that the said Court be directed to grant a new trial of said cause.

TUCKER & HYLAND and
EDWARD H. CHAVELLE,
Attorneys for Defendant.

315 Lyon Building,
Seattle, Washington.

Received copy of within Assignment of Errors
this 15th day of April, 1924.

THOS. P. REVELLE,
U. S. Attorney.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Apr. 15, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [19]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 7934.

GLENN FULKERSON,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

BOND ON APPEAL.

We, Glenn Fulkerson, as principal, and Sidney Brunn and Leo C. Jacobson, as sureties, all of Seattle, Washington, jointly and severally acknowledge ourselves to be indebted to the United States of America in the sum of \$2,000.00, lawful money of the United States, to be levied on our goods and chattels, lands and tenements, for the payment of which, well and truly to be made, we bind ourselves and each of us, our heirs, and executors, jointly and severally by these presents.

The condition of the above obligation is such, that whereas in the above-entitled cause a writ of error has been issued to the Circuit Court of Appeals for the Ninth Circuit from the judgment and sentence entered therein, and an order has been entered fixing the amount of the bail bond for the release of the defendant Glenn Fulkerson, upon bail, pending the determination of said writ of error by said appellate court, in the sum of \$2,000.00.

Now, therefore, if the said Glenn Fulkerson, as principal shall appear and surrender himself in the above-entitled court and from time to time thereafter as may be required, to answer any further proceedings, and shall obey and perform any judgment or order which may be had or rendered in said cause, and shall abide by and perform any judgment or order which may be rendered in the said United States Circuit Court of Appeals for the Ninth Circuit, [20] and shall not depart from said District without leave first having been obtained from the Court, then this obligation shall be null and void; otherwise to remain in full force and effect.

IN WITNESS WHEREOF, we have set our hands and seals this 15th day of April, 1924.

GLEN FULKERSON,

Principal,

SIDNEY BRUNN,

LEO C. JACOBSON,

Sureties.

United States of America,
Western District of Washington,
Northern Division,—ss.

Sidney Brunn and Leo C. Jacobson, being first duly sworn, on oath each for himself and not one for the other, deposes and says: that he is a resident of the above District, and that after paying all just debts and liabilities, he is worth the sum of \$4,000.00 in real property subject to execution within said District, over and above all exemptions, and ex-

clusive of community interests, being his sole and separate property.

LEO C. JACOBSON.
SIDNEY BRUNN.

Subscribed and sworn to before me this 15th day of April, 1924.

[Seal] EDWARD H. CHAVELLE,
Notary Public in and for the State of Washington,
Residing at Seattle.

O. K.—MATTHEW W. HILL,
Asst. U. S. Attorney.

Approved.

NETERER,
Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Apr. 15, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [21]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7934.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GLEN FULKERSON et al.,

Defendants.

ORDER EXTENDING TIME TO AND INCLUDING JUNE 19, 1924, FOR FILING, SERVING AND SETTLING BILL OF EXCEPTIONS.

For good cause now shown, it is ORDERED that the time for serving, filing and settling bill of exceptions in the above-entitled cause be and it is hereby extended to the 19th day of June, 1924.

Done in open court this 12th day of May, 1924.

JEREMIAH NETERER,
Judge.

O. K.—C. T. McKINNEY,
Asst. U. S. Attorney.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. May 12, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [22]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7934.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GLEN FULKERSON et al.,
Defendants.

ORDER EXTENDING TIME TO AND INCLUDING JULY 15, 1924, TO FILE RECORD.

For good cause shown, it is ORDERED that the time for filing the record in the above-entitled cause, in the office of the Clerk of the Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, be and the same is hereby extended to the 15th day of July, 1924.

Done in open court this 25th day of June, 1924.

JEREMIAH NETERER,
Judge.

O. K.—C. T. McKINNEY,
Asst. U. S. Attorney.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 25, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [23]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7934.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GLEN FULKERSON et al.,

Defendants.

BILL OF EXCEPTIONS.

BE IT REMEMBERED, that this cause came on regularly for trial on the 26th day of February, 1924, before the Honorable Jeremiah Neterer, one of the Judges of the above-entitled court, sitting with a jury, duly empanelled and sworn.

The Government appearing by Thomas P. Revelle and C. T. McKinney, District Attorney and Assistant District Attorney, respectively.

The defendant, Glen Fulkerson, appearing by Messrs. Tucker, Hyland & Elvidge, and the defendant Luella Nulph, appearing by John F. Dore, Esquire.

The jury having been duly impaneled and sworn to try the cause, and counsel for the plaintiff having made his opening statement to the jury, thereupon the following proceedings were had and done, to wit:

TESTIMONY OF WALTER M. JUSTI, FOR
THE GOVERNMENT.

WALTER M. JUSTI, called as a witness on behalf of the Government, being first duly sworn, testified for and on behalf of the Government, as follows:

That he is a Prohibition Agent; that he visited the Metropolitan Apartments, Apartment F, with Agent O'Hara; that the door was opened by Ruth Miller, who invited them into the room; [24] that he then inquired if she had any drinks of liquor, and she said "Yes," and Justi told her he would

(Testimony of Walter M. Justi.)

like some Scotch whiskey, and O'Hara said he would like some gin; she returned to the room with a serving glass full of gin in her hand, and a flask of whisky in the pocket of her dress; she delivered the gin to O'Hara and then served Justi from the flask of whisky; O'Hara asked her how much it would be for the bottle. She said, "Well, they are five dollars apiece." O'Hara said, "Well, I will give you \$5.00 for these two drinks and what is left in the bottle." She said, "I will see," and went outside. After a few minutes the door opened and Mr. Fulkerson came in, and said, "It is all right for the five," and passed the bottle to O'Hara and received \$5.00 in payment. Witness then notified Fulkerson that he was under arrest. Agent Kline took the \$5.00 bill which had been previously marked, and the search-warrant was served, and they went through the rest of the apartment; in the kitchen they found a quantity of moonshine whisky, home brew beer and some gin; in the stairway of the bathroom, they found 2 quarts of whisky, in the upper drawer of the dresser there were a number of men's shirts and socks and underwear, collars, handkerchiefs, and neckties, and also some memorandum, papers and receipts showing that the telephone there was paid in Fulkerson's name.

Mr. TUCKER.—I object to that as not being the best evidence.

The COURT.—Sustained.

A few days after he was arrested, Agent Justi further testified, Fulkerson stated he had helped

(Testimony of Walter M. Justi.)

Mrs. Nulph get established in business, because she was a widow with two or three children; that Mrs. Nulph was not there at the time Fulkerson was arrested, but subsequently entered the premises, and was arrested by Justi. [25]

Q. Now, continue with what Fulkerson told you.

A. Fulkerson told me that he had established Mrs. Nulph there.

Mr. DORE.—I take it this statement would not be binding on anybody but Mr. Fulkerson, after the arrest.

The COURT.—This statement would not be binding only upon the defendant Fulkerson, not against the woman, Mrs. Nulph.

Mr. TUCKER.—I will object to it on the ground it does not tend to prove anything as against Fulkerson, what he said with reference to establishing her.

The COURT.—Overruled.

Mr. TUCKER.—Exception.

Q. (By the COURT.) State what was said.

Witness Justi further testified that he had helped establish Mrs. Nulph in the apartments and bootlegging game, because she had two or three children; that when they were searching the place Fulkerson assisted, and said that the liquor upon the upper shelf in the kitchen was "All moon."

On cross-examination, Witness Justi repeated that he had conversation with Mrs. Nulph, one of the defendants, and she stated it was her home. Agent Justi further identified the plan of the rooms,

(Testimony of Walter M. Justi.)

and the room in which some of the clothing of Fulkerson was found.

On redirect examination, witness Justi identified diagram of the house, and more specifically a room in which was found some of the clothing of Fulkerson, his handcuffs, his pistol and his club; that the defendant Miller went out in the hallway and the defendant Fulkerson came in.

TESTIMONY OF GORDON B. O'HARA, FOR THE GOVERNMENT.

GORDON B. O'HARA, called as a witness on behalf of the Government, being duly sworn, testified as follows: [26]

That he is a Federal Prohibition Agent, and has been in the service for four years; that he went with Officer Justi to Apartment F, 515 Seneca Street, known as the Metropolitan Apartments; that they were let in to the premises by a lady who gave her name as Miller; went into the front room; Agent Justi asked the defendant Miller if she had a drink of Scotch, and she said yes. Witness told her he would take gin. She went out and returned with a serving glass containing gin, and a flask containing whiskey; she served witness the gin, and served a drink to Justi from the bottle; he asked her how much for the bottle and she said five dollars. Witness told her he would give her five dollars for the two drinks and what was left in the bottle; she hesitated a moment and said, "Well, I

(Testimony of Gordon B. O'Hara.)

will have to find out," and left the room, and in about two minutes Fulkerson came in with the bottle, and handed it to one of the agents, he does not recall which, and when witness asked him how much it was he said five dollars. Witness asked, "Does that include the two drinks we had?" and he said, "Yes, that is right." Witness then handed him the five dollars. They heard some noise in the hall, and defendant Fulkerson said there is some one outside; Justi said he would go and get them, that they were our friends, and went out; that Fulkerson, still with the \$5.00 in his hand went with witness into his room just off the entrance; shortly after Griffith, Justi and Kline came in; Justi showed Fulkerson his badge, and placed the defendant Fulkerson under arrest, and Agent Kline took the five-dollar bill out of his hand; they then proceeded to search the place, and found the liquor hereinbefore described; Fulkerson told them that if they were willing, the Nulph woman would take the fall for the whole thing; that he was a policeman and a particular friend of the Mayor; that there was a telephone in the building; [27] that Fulkerson was dressed in his uniform trousers, of regulation policeman's uniform; did not have coat or vest on.

On cross-examination witness repeated that he found in the room that Fulkerson occupied, several telephone bills in Fulkerson's name, and his clothing; Fulkerson admitted that it was his clothing, also that he maintained a home at 322 Mer-

(Testimony of Gordon B. O'Hara.)

cer Street, where he had a wife and four children; he admitted that he had a room at the premises in question, because he worked in the building next to it, and used this room to sleep in; that the only people in the building when he went in, so far as he knew, were Fulkerson and the Miller woman, and a stranger.

On redirect examination, the witness identified the \$5.00 bill he gave to the defendant to pay for the two drinks and the bottle; identified Exhibit No. 13, as the receipted telephone bill for this particular—(place).

Mr. DORE.—It speaks for itself; I object to it.

Mr. McKINNEY.—He is telling what it is.

Witness testified that he found this bill in Fulkerson's room in a drawer; that there were several of them.

TESTIMONY OF C. W. KLINE, FOR THE GOVERNMENT.

C. W. KLINE, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

That he is a Prohibition Agent; that the flask called Government's Exhibit 1, for identification, was the flask regarding which the evidence herein was given; that it contains whiskey, eighty proof, forty alcohol, fit for beverage purposes; that it was found in the premises at 515 Seneca Street; that he took the money out of the hand of defendant

(Testimony of C. W. Kline.)

Fulkerson, and it had been in his custody ever since; identified other exhibits found, that they contained alcohol [28] and were fit for beverage purposes; that he arrested the defendant Fulkerson as soon as he entered the apartment.

On cross-examination, witness testified, that Agent O'Hara went up and tried to make a buy; that he came down, and all four agents went up. He was not there during the negotiations carried on with reference to buying a bottle of whiskey; when he came in they told him the defendant Fulkerson had the money, and they told him to get it, and he reached down and took it out of Fulkerson's hand; Fulkerson was standing in the hall, just to the right of the door as you go in; some alcohol had been taken which was intended for rubbing purposes and were returned to Mrs. Miller by the witness.

On redirect examination, witness testified that he returned the bottles of denatured alcohol two or three days after the arrest.

This was substantially all the testimony offered in support of Government's case. Thereupon the Government rested.

TESTIMONY OF GLEN FULKERSON, ON HIS OWN BEHALF.

GLEN FULKERSON, also called as a witness on his own behalf, being first duly sworn, testified as follows:

That he is one of the defendants in the above-

(Testimony of Glen Fulkerson.)

entitled cause; that he is 34 years of age, and lived at 322 Mercer Street, is married and has four children, and lives with his family; that he had heard the testimony of the Prohibition Agents; that on the 10th of September he lived with his family, and his occupation was that of policeman; that he had been on the force about three and one-half years; that his beat was 7th and University; outside of his occupation as policeman, he was working as a door man, at the Hippodrome, [29] and had been employed there for three months, in addition to his duties as a police officer; that he worked from 8:30 until 1 or 1:15 at night for the Hippodrome; that he walked his beat from 12 until 8 o'clock in the evening, that he rented a room at 515 Seneca Street, and it was one of the rooms of the apartment subject to this controversy; that he had a front bedroom, for three months; that he had a telephone put in his room, at his own expense, and in his own name; that he had nothing to do with the rest of the apartment, and rented the room from Mrs. Nulph, a codefendant, and paid her \$15.00 a month for the room; did not know Mrs. Miller, another codefendant; had nothing to do with the whiskey in the case; had nothing to do with selling it; what happened on this particular occasion was that he had received a check for one-half month's pay from the Police Department; the pay was short, and the Captain told him to go in and see the Commissioner and have it fixed; that he had gone in and had it fixed, and came up to get his

(Testimony of Glen Fulkerson.)

things in this room; that on the 1st of September he started working nights, and his beat was changed to Washington Street; that this was on the 10th of September, 1923; that he had had the room up to the 1st, and never had taken his things away, and came on this day to get his things; that the 30th day of August was the last time he had been there previous to his arrest; the landlady had taken the room over from the first to the 10th of September, after he had left; he was there only to get his clothes and what things he had left there; that he came back from the station after having his check fixed up, and his wife, brother and sister were out in the car in front of the building waiting for him to get his things; these things included a uniform which he wore during the summer months on the afternoon shift, and other clothing; that it was about 2:15 or 2:30; that all the tenants in the flat had a key for the outside door; there are [30] two or three tenants in each flat, and have a key to enter the room which was right to the left; that he took off his coat and hat, and went to the lavatory; after he left the lavatory and came up through the hall, a lady, who has since been identified as Mrs. Miller, came from the front room, not his room, and said, "Here is this bottle of yours. It ought to be pretty good for your rheumatism." He said, "I don't know anything about it," and she looked at him, and said, "Where did you come from?" Witness said, "I came from the lavatory," and she said, "You just hand it to them" and she

(Testimony of Glen Fulkerson.)

opened the door, and Fulkerson stepped in. There were two gentlemen in the front room, and he handed one of them the bottle, and he gave Fulkerson some money, and he asked him what that was for, and he said for the bottle. That Fulkerson turned around to look for the girl, but she was gone. The men then said they were Federal officers and put Fulkerson under arrest. That Fulkerson had never seen the Miller woman before; did not know anything about the whiskey, nor have any interest in it, or have anything to do with it; never told Agent O'Hara that he had started Mrs. Nulph in business, nor to keep quiet, they were making too much noise; did not know a thing about the transaction, outside of what he had just stated; did not tell Agent O'Hara that Mrs. Nulph would fall for the thing; that he did not go back in the kitchen and tell the officer there was moonshine there; that while they were searching the house he was detained by Officer Kline right in the front room; that he had nothing to do with renting the apartment or operating it; never in trouble of any kind; before becoming a policeman had been engaged in ranching.

On cross-examination, defendant Fulkerson testified: repeated that he had lived in the apartment three months; had gone in there about the first of June; that he was patrolling a beat from 12 at noon until 8 at night, and was working at the Hippodrome from [31] quarter to nine until one or 1:15, depending upon how the crowd got out; that

(Testimony of Glen Fulkerson.)

Mr. Fisher is the man who runs the Hippodrome; that he rented the room at the apartment because he had to be close to make a change of his clothing, and could not go home; the cars stopped running at one o'clock. That there were several other tenants in the apartment; that he was renting from Mrs. Nulph, codefendant. Witness Fulkerson repeated that he did not know Mrs. Miller, and had never seen her before she handed him the bottle; did not know what was in the bottle, and neither did he look to see, nor had the officer that he handed it to.

Q. (By the COURT.) Was the bottle wrapped up; anything around it? A. No, sir.

Q. (By Mr. McKINNEY.) Did they hand you a \$5.00-bill?

A. Yes, sir; they said, "Here, give this to the girl."

Q. Who were you talking to at that time?

A. O'Hara.

Q. You were talking to O'Hara? A. Yes, sir.

That Agent Kline took the money from his hand. He was standing by the front door, in the hall; that he had paid the telephone bill.

Q. Showing you Government's Exhibit 14 marked for identification, I will ask if you have seen that before? A. Yes, sir.

Q. What is it? A. A receipt.

Q. A receipt for what? A. The telephone.

Q. Did you pay for it? A. Yes, sir. [32]

(Testimony of Glen Fulkerson.)

Q. Showing you Government's Exhibit 13, I will ask you if you have seen that before?

A. Yes, sir.

Q. What is it? A. Another receipt.

Q. Did you pay that bill?

A. I presume so; I paid every one of them.

Q Did you ever pay any other bills up there?

A. No, sir.

Defendant Fulkerson testified that he kept those bills in a dresser drawer.

On redirect examination, defendant repeated that his brother, sister and wife were waiting out in front of the building in the car; the phone that was put in the premises was for his own convenience.

TESTIMONY OF JOHN VALSUANO, FOR DEFENDANT.

JOHN VALSUANO, called as a witness on behalf of the defendant Fulkerson, being first duly sworn, testified as follows:

That he had known the defendant Fulkerson for six or seven years; that he knew the reputation of the defendant for honesty and being a law-abiding citizen, and that his reputation was good.

Mr. TUCKER.—I have several more character witnesses who were to be here at 2:30, your Honor.

Mr. McKINNEY.—The Government will admit they will testify to his good character.

Mr. TUCKER.—Will you admit he was employed

(Testimony of Richard Burr.)

there by Mr. Fisher at the time he was arrested there at the Hippodrome?

Mr. McKINNEY.—Absolutely. [33]

Mr. TUCKER.—Mr. Hines, a real estate broker, will be here at 2:30, and the other men are on the election board.

Mr. McKINNEY.—The Government will admit they will all testify to his good character.

TESTIMONY OF RICHARD BURR, FOR DEFENDANT.

RICHARD BURR, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

That he had known Mr. Fulkerson for five or six years, and that his reputation for integrity and being a law-abiding citizen was good.

Mr. McKINNEY.—The Government will admit that anybody he brings in will testify to his good character.

Mr. TUCKER.—Three witnesses.

Mr. McKINNEY.—We will admit that the three will testify to that, your Honor.

This was substantially all the testimony and evidence offered in support of the defendant's case.

At this point, the defendant, through his counsel, moved the Court for an order directing a verdict of not guilty on count 1, and for an order directing a verdict of not guilty on count 2 and for an order directing the jury to return a verdict of not guilty on count 3.

(Testimony of Richard Burr.)

The COURT.—Motion denied.

Mr. TUCKER.—The Court will allow an exception on each one?

The COURT.—Yes. [34]

The Court then sustained the motion of Mr. Dore as to Count 2. And the Assistant District Attorney moved for a dismissal of the remaining two counts against Mrs. Nulph, which was granted by the Court.

Mr. TUCKER.—I renew my motion for a directed verdict in favor of the defendant Fulkerson on all three counts.

The COURT.—Denied.

Mr. TUCKER.—Exception.

The COURT.—Allowed.

Mr. McKINNEY.—(During opening argument.) Everybody in town knows the reputation of the Hippodrome.

Mr. TUCKER.—I take an exception to that remark as being prejudicial, and not based upon any evidence.

The COURT.—Note an exception.

Mr. TUCKER.—Ask the Court to instruct the jury not to pay any attention to the argument of counsel with reference to the reputation of the place, because there is not a syllable of evidence as to the reputation of the place.

The COURT.—Proceed with the argument.

Mr. TUCKER.—Allow me an exception; there is no evidence to that effect; and ask the Court to instruct the jury there is no evidence to that effect.

Mr. McKINNEY.—(During closing argument.) I submit he is guilty on all three of the counts, and should be punished.

Mr. TUCKER.—I object to counsel making any argument about any punishment; it is not any of his business.

(No ruling.) [35]

After the argument on behalf of the Government and on behalf of the defendant, the Court gave its instructions to the jury as follows:

INSTRUCTIONS OF COURT TO THE JURY.

The COURT (Orally).—The information in this case, Gentlemen of the jury, charges the defendants, Glen Fulkerson, Luella Nulph and Ruth Miller with violating the National Prohibition Act. Count 1 charges the possession unlawfully on the 10th day of September, 1923, of quantities of liquor, which is set out in that count, by the defendants. Count 2 charges, on the same day, the 10th of September, a sale of intoxicating liquor, containing the prohibited alcoholic content, and known as whiskey. Count 3 charges the defendants with maintaining a nuisance, by keeping, selling and bartering intoxicating liquor in the particulars described, contrary to law. The defendant, Ruth Miller, failed to appear; she has left the jurisdiction of the court, and her bail was forfeited this morning, and a benchwarrant was issued; when she is apprehended she will have to be tried separately; and the Court has indicated that it would sustain a motion made by the defendant, Luella Nulph, with relation to Count

2, and the Government has moved to dismiss Counts 1 and 3 as to her; so the Clerk is now directed to enter judgment in favor of the defendant, Luella Nulph, on all of the counts in the information. You are concerned only then with the guilt or innocence of the defendant, Glen Fulkerson. He has pleaded not guilty, that means he denies each and every count in the information. He is presumed innocent until he is proven guilty by the testimony which is presented. This presumption continues throughout the trial until you are convinced by the evidence of his guilt by that degree of proof. The burden is upon the Government to show he is guilty beyond every reasonable doubt, and this must be shown by testimony [36] which is direct and positive, presented on the part of the Government, or it may be likewise testimony on the part of the defendant.

In this case with relation to a part of the liquors charged in this information there is not much dispute. With relation to other liquor which has been admitted in evidence will be determined by you from all the testimony which is presented and by circumstances and facts which have relation to this issue.

You are instructed that evidence is of two kinds, direct and circumstantial. Direct evidence is produced by witnesses testifying directly of their own knowledge of the facts to be proven. Circumstantial evidence is proof of such facts and circumstances in a case from which the jury may infer other and connected facts, which usually and reasonably follow, according to the common experience of mankind. Circumstantial evidence is legal and com-

petent in criminal cases, and when it is of such a character as to exclude every other reasonable hypothesis than that the defendant is guilty, then it is entitled to the same weight as direct testimony. Circumstantial evidence, if any, should be considered by you in connection with all the other evidence before you, and if you do not believe, or have a reasonable doubt as to the defendant's guilt, then you should convict; but if you entertain a reasonable doubt with relation to the guilt, after considering all the evidence, which is presented, then you should return a verdict of not guilty. All the circumstances should be consistent with each other; consistent with the guilt of the defendant, and inconsistent with his innocence, and consistent with every other reasonable hypothesis except that of his guilt.

You, Gentlemen of the Jury, are the sole judges of all the facts in the case, and you are likewise the sole judges of the credibility of the witnesses. You are instructed in weighing the testimony of any of the witnesses who have testified before you, in [37] order to give it the credence it is entitled to, you should take into consideration the demeanor of the witness upon the witness-stand, the reasonableness of the story, the opportunity of the witness for knowing the things about which he has testified, and the interest, or lack of interest in the result of this trial, and from all this determine who did tell the truth, and then conclude with relation to the fact which has been established.

You are instructed that it is against the law for a person to have in his possession intoxicating liquor,

such as charged in this information, containing the prohibited alcoholic content, and being fit for beverage purposes.

In determining then what the fact is, you will consider all the circumstances that have been detailed herein; take the room or place where the liquors were found as shown by the testimony here; take the relation of the defendant to these premises; his conduct when he was in the room admitted by him, and in these premises; the testimony that he gave upon the stand; the testimony of the witnesses on the part of the Government, and from them you must determine what his relation is. If his relation was that of proprietor in a broad sense; if the relation was as testified to by some of the witnesses on the part of the Government, that he was helping this woman out, who was a widow and has three or four children, and if you believe from all the circumstances and the testimony developed here that the defendant was the real proprietor, and in possession of the premises, and if these liquors in the kitchen were really his possession, if he was the directing mind,—was the controlling influence and force with relation to the premises and of these liquors, then you would find he was in possession of it all.

Now, then, what is the testimony on the part of the Government? The witnesses on the part of the Government say, that [38] when they went in this Miller woman brought them in some drink, and then they asked for a flask, and she went out and said, "Wait a minute"; went out with the partially filled

flask, and then came back with the defendant; the defendant said "That is all right, \$5.00 for the bottle and for the two drinks," and gave the bottle to Mr. O'Hara and took the \$5.00.

Now the defendant says that he was in the hall, that he did have his coat off, as the officers of the Government say he did; that he did come into the room with the bottle of whiskey in his hand; that he did deliver to one of these men the bottle and did receive \$5.00. Now that far the testimony harmonizes. Now he said that the woman gave it to him; he did not know what it was; told him to give it to the man, and he did it; then the officers came in and they found the \$5.00 in his hand, just as the officers testified they did. Now he was asked whether the bottle was wrapped up, he said no. He said he did not know what was in the bottle. It is for you to determine the fact. Now if he was in the hall, and if this woman gave him the bottle and told him to deliver it to these men, and he did not know what was in the bottle, and gave it to the men, without knowing what was in the bottle, and got the \$5.00 without knowing what was in the bottle, or what he was doing, if you believe that, then he is not guilty, because he didn't know what was in the bottle. If you believe that a man could be on the police force in Seattle for three years and have a flask like that passed to him, with that color of contents,—a man on the police force, and not knowing it was whiskey or prohibited spirits provided by the Volstead law and the Prohibition amendment, then you must conclude that way, because it is for you

to determine what the fact is. Now, I don't want you to conclude from any opinion you may think I have of the facts. I don't believe a word of it, myself; I believe he knew what was in the bottle; but [39] that must not control you; you must find the fact. And while I have a right to tell you what I think about the facts, you must not be controlled by what I think about them; you must weigh all the testimony and all the circumstances, and determine what the truth is. If you have a reasonable doubt as to the facts, then you should return a verdict of not guilty. But if you are convinced beyond a reasonable doubt that he did know what was in the bottle, then it is your duty to return a verdict of guilty on the first count, and of guilty on the second count, because the possession of that one bottle would be sufficient to violate the law, as charged in this information, of possession and sale.

Now as to the next count, the count of the common nuisance, this is what the law says: "Any rooming house or building where intoxicating liquor is kept, in violation of the National Prohibition Act, is declared to be a common nuisance." Now if he was in possession of this liquor in the kitchen, if you believe he was in possession of that, and believe it was kept there, then you must find it was in violation of the National Prohibition Act, because he had no right to keep it there; and then if you find that this annoyed such part of the public that came in contact with it, and was not authorized by law under the National Prohibition Act, such would be a nuisance, and if you believe that beyond a reason-

able doubt, then it would be your duty to return a verdict of guilty upon count 3. But if you have a reasonable doubt upon that, then you will return a verdict of not guilty.

Now in these instructions, Gentlemen of the Jury, I have related and referred to the facts or testimony, and the circumstances with a view of illustrating or demonstrating some proposition of law which has its application to the facts, and have expressed some personal opinion, but I do not want you to be controlled by it in [40] any sense, but I want you to conclude upon the evidence itself, so that the law may be administered fairly, if the law has been violated that it may be enforced, and the parties who violate it be punished. When courts cease to function properly then God have mercy upon the people of the United States. Law is a rule of civil conduct prescribed by a superior power, and persons must regulate their conduct with relation to that law. It is a rule by which people shall live, and when they violate that rule why then they must be punished; that is the only way we can have government; and when courts and juries won't function it will only be a short step to a condition of anarchy.

If you believe that the defendant went on the stand and perjured himself with a view of escaping a penalty, you will so conclude. Pass upon this fairly. It is your duty as twelve fair-minded men to give the defendant a square deal; he is entitled to it; the Government is entitled to a square deal, give it a fair and a square deal in this case, and if you have

a reasonable doubt upon all the circumstances developed here, you will resolve it in favor of the defendant; if you are convinced beyond a reasonable doubt, then return a verdict of guilty in this case, as your conscience dictates, and the right and truth is.

You are instructed a reasonable doubt for a trial juror is such a doubt as the term implies. It is such a doubt as a man of ordinary prudence, sensibility and decision in determining an issue of like concern to himself as that before the jury to the defendant, would make him pause or hesitate in arriving at his conclusion. It is a doubt which is created by the want of evidence, or may be by the evidence itself. It is not speculative, imaginary or conjectural doubt; a juror is satisfied beyond a reasonable doubt when he is convinced to a moral certainty of the guilt of the party charged. [41] I believe I have covered the case. Any exceptions?

Mr. TUCKER.—I want to take an exception, your Honor, to that portion of your Honor's instructions to the jury wherein, commenting upon the evidence of the defendant, you said you did not believe it. I take an exception to it as being an infringement upon the rights of the defendant to have his case tried by a jury, and to pass upon the facts.

The COURT.—Exception noted.

Mr. TUCKER!—I further take an exception to it upon the ground it is not your province to express your opinion as to what you believe about the evidence to the jury.

The COURT.—Yes, let the exception be noted.

Mr. TUCKER.—I also take an exception to your Honor's instructions to the jury giving a definition of the term as to what a common nuisance is under the Volstead Act, for the reason,—I may be mistaken with reference to my judgment of the law,—but your Honor did not correctly interpret the law as to the common nuisance as created by that act; that my opinion as to the law is, it is not a common nuisance to have liquor in one's possession, in one's own premises, for one's own use under that act. Your interpretation to the jury of the act prohibits that liberty extended to the defendant under the act.

The COURT.—In that connection I perhaps might say, while I do not believe the exception is well taken, I will say, that the only exception when a person may have liquor in his own premises is when he has it pursuant to the provisions of the law. One of those provisions is that he must have had it at the time that the act took effect. and when it is shown that he had the possession of it, the burden is upon him to show that he came by it lawfully. In this case he admitted he had possession of this flask, and there is no testimony here that he came by it lawfully, and the burden is upon him to show [42] that he came by it lawfully.

Mr. TUCKER.—The Court will allow me an exception to the last instruction?

The COURT.—Yes.

Mr. TUCKER.—I contend it is not a correct interpretation of the law.

The COURT.—Yes.

Mr. TUCKER.—I also take exception to that portion of your Honor's instructions to the jury where-

in you dilated upon the necessity for the enforcement of the criminal law, and the necessity for the punishment of those charged with crime, who might be convicted.

The COURT.—Yes, note that exception.

Mr. TUCKER.—As being an infringement upon the right of the defendant to have a fair trial by a jury.

The COURT.—Yes, let the exceptions be noted.

The jury then retired, and after deliberation returned a verdict of guilty as charged.

Thereafter and within the time allowed by law and before sentence was imposed, defendant moved for a new trial and at the same time also moved in arrest of judgment. Thereupon the Court denied each of said motions. The Government moved for judgment and sentence and the Court then entered judgment and sentence as follows, viz: That defendant pay a fine of \$500.00, under count 1, and serve six months in the King County Jail, under counts 2 and 3, said two periods of six months to run concurrently.

And now, in furtherance of justice and that right may be done the defendant, and inasmuch as the foregoing facts do not appear fully of record, the defendant prays that this, his bill of exceptions may be settled, allowed, signed and sealed by the Court, and made a [43] part of the record herein.

EDWARD H. CHAVELLE,

TUCKER, HYLAND & ELVIDGE,

Attorneys for Defendant Glenn Fulkerson.

315 Lyon Building,

Seattle, Washington.

Due service of copy of within bill of exceptions admitted, and receipt of copy thereof acknowledged this —— day of April, 1924.

United States Attorney. [44]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 7934.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GLEN FULKERSON et al.,

Defendants.

ORDER) SETTLING BILL OF EXCEPTIONS.

Now, on the 9th day of June, the above cause came on for hearing on the application of the defendant to settle the bill of exceptions in this cause, counsel for both parties appearing; and it appearing to the Court that said bill of exceptions contains all of the material facts occurring upon the trial of the cause, together with the exceptions thereto and all of the material matters and things occurring upon the trial except the exhibits introduced in evidence, which are hereby made a part of said bill of exceptions and the Court being duly advised, it is by the Court

ORDERED, that said bill of exceptions be and it is hereby settled as a true bill of exceptions in said cause, which contains all of the material matters, facts, things and exceptions thereto occurring upon the trial of said cause, and not of record heretofore, and the same is hereby certified accordingly by the undersigned Judge of this court, who presided at the trial of said cause, as a true, full and correct bill of exceptions and the Clerk of the court is hereby ordered to file the same as a record in said cause and transmit the same to the Honorable Circuit Court of Appeals for the Ninth Circuit.

JEREMIAH NETERER,

U. S. District Judge.

Received copy of bill of exceptions this 24th day of April, 1924.

THOS. P. REVELLE,

M. M.,

U. S. Attorney.

[Endorsed]: Lodged in the United States District Court, Western District of Washington, Northern Division. Apr. 24, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Jun. 9, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [45]

In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.

No. 7934.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GLEN FULKERSON,

Defendant.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You will please prepare copies of the following documents and papers in the above cause, and forward them under your certificate and seal to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, as a transcript of the record in said cause, viz.:

1. Information.
2. Arraignment.
3. Plea of not guilty.
4. Record of days trial and journal entry of order empaneling jury.
5. Verdict of guilty.
6. Motion in arrest of judgment.
7. Motion for new trial.
8. Order denying motion for new trial and in arrest of judgment.
9. Sentence and judgment of Court.
10. Petition for writ of error.

11. Assignment of errors.
12. Writ of error with order attached.
13. Citation in error.
14. Bond on writ of error.
15. Order extending time for serving and filing record.
16. Order extending time for settling bill of exceptions.
17. Bill of exceptions, with allowance and endorsement thereon.
18. Order settling and allowing bill of exceptions.
19. Praecipe for appellate record.
20. Clerk's certificate.

Dated at Seattle, Washington, June 14, 1924.

EDWARD H. CHAVELLE,
Attorney for Defendant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 16, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [46]

In the United States District Court for the Western
District of Washington, Northern Division.

No. 7934.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GLEN FULKERSON et al.,

Defendants.

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington,—ss.

I, F. M. Harshberger, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 46, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above and foregoing entitled cause, as is required by praecipe of counsel filed and shown herein, as the same remain of record on return to writ of error herein, from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true, and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the plaintiff in error for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [47]

Clerk's fees (Sec. 828, R. S. U. S.) for making record, certificate or return, 118 folios at 15¢	\$17.70
Certificate of Clerk to transcript of record, 4 folios at 15¢	60
Seal to said certificate	20

I hereby certify that the above cost for preparing and certifying record, amounting to \$18.50 has been paid to me by attorney for plaintiff in error.

I further certify that I hereto attach and herewith transmit the original writ of error and the original citation issued in this cause.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, at Seattle, this 23d day of July, 1924.

[Seal] F. M. HARSHBERGER,
Clerk United States District Court, Western District of Washington. [48]

In the United States Circuit Court of Appeals for
the Ninth Circuit.

No. 7934.

GLEN FULKERSON,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

WRIT OF ERROR.

United States of America,
Ninth Judicial Circuit,—ss.

The President of the United States of America: To
the Honorable Judge of the District Court of
the United States for the Western District of
Washington, Northern Division:

Because in the record and proceedings, as also in

the rendition of judgment, of a plea which is in the said District Court before you, between the United States of America as plaintiff and Glen Fulkerson as defendant, a manifest error hath happened, to the great damage of said defendant, Glen Fulkerson, as by his complaint appears, and we being willing that error, if any hath been, should be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, within thirty days from the date hereof, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done. [49]

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States, this 15th day of April, 1924.

[Seal] F. M. HARSHBERGER,
Clerk of the United States District Court for the
Western District of Washington.

Due service of within writ of error admitted and receipt of copy thereof acknowledged this 15th day of April, 1924.

THOS. P. REVELLE,
M.,
U. S. Attorney. [50]

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Apr. 15, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7934.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GUY FULKERSON,

Defendant.

CITATION ON WRIT OF ERROR.

United States of America,—ss.

The President of the United States of America, to the United States of America, and to Thomas P. Revelle, United States Attorney for the Western District of Washington, Northern Division, GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, in the State of California, within thirty days from date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, wherein the said *Guy Fulkerson*

is plaintiff in error, and the United States of America is defendant in error, to show cause, if any there be, why judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the party in that behalf.

WITNESS the Honorable JEREMIAH NETERER, Judge of the District Court of the United States for the Western District of Washington, Northern Division, this 15th day of April, 1924.

[Seal]

JEREMIAH NETERER,
United States District Judge.

Received copy this 15th day of April, 1924.

THOS. P. REVELLE,
A. M.,

U. S. Attorney. [51]

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Apr. 15, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

[Endorsed]: No. 4312. United States Circuit Court of Appeals for the Ninth Circuit. Glen Fulkerson, Plaintiff in Error, vs. United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Received July 25, 1924.

F. D. MONCKTON,
Clerk.

Filed August 20, 1924.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the District Court of the United States for the
Western District of Washington, Northern Division.

GLEN FULKERSON,
Plaintiff in Error,
vs.

UNITED STATES OF AMERICA,
Defendant in Error.

ORDER UNDER SUBDIVISION I OF RULE
16 ENLARGING TIME TO AND INCLUDING
JULY 28, 1924, TO FILE RECORD
AND DOCKET CAUSE.

STIPULATION.

IT IS HEREBY STIPULATED AND
AGREED, by and between Thomas P. Revelle, Es-
quire, United States Attorney, and C. T. McKinney,
Assistant United States Attorney, and Edward H.
Chavelle, attorney for the plaintiff in error, that the
time for filing the record in the above-entitled case
be, and it is hereby extended to the 28th day of July,
1924.

Dated at Seattle, Washington, July 22d, 1924.

C. T. McKINNEY,

Asst. United States Attorney.

Assistant United States Attorney.

EDWARD H. CHAVELLE,

Attorney for Plaintiff in Error.

[Endorsed]: Filed in the United States District
Court, Western District of Washington, Northern
Division. Jul. 22, 1924. F. M. Harshberger,
Clerk. By _____, Deputy.

No. 4312. United States Circuit Court of Ap-
peals for the Ninth Circuit. Order Under Subdi-
vision 1 of Rule 16 Enlarging Time to and Including
July 27, 1924, to File Record and Docket Cause.
Filed Jul. 25, 1924. F. D. Monckton, Clerk. Re-
filed Aug. 20, 1924. F. D. Monckton, Clerk.

